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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 497

AUBREY B. BURTON, Doing business as A. B. BURTON COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

W. G. Bussard,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 497

AUBREY B. BURTON, DOING BUSINESS AS A. B. BURTON COMPANY, *Appellant,*

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

JURISDICTIONAL STATEMENT

This suit was filed by Aubrey B. Burton, doing business as A. B. Burton Company, on December 18, 1948, in the United States District Court for the Western District of Virginia, against the United States of America. The purpose of this suit was to have a special court of three judges to hear our petition, concerning certain orders issued by the Interstate Commerce Commission and then to set aside, annul, and forever enjoin the enforcement, operation or execution of Service Order No. 68, issued January 30, 1942, and orders of September 28, 1944, December 5, 1945, and April 5, 1948, issued in Docket 29072, A. B. Burton Company v. Pennsylvania Railroad.

The reasons why the report and orders aforesaid should be set aside, annulled, and the enforcement, operation and

execution thereof forever enjoined, among others, are that two District Courts hold separate views on the proper interpretation of the same statute (49 USCA 1 (15)), thus leaving uncertain the meaning of the law; that they permit the Commission to disregard the language of the statute by suspending on a nation-wide basis the application of the provisions of Rule 34 of the Classification when the statute (Section 1 (15) of the Act, 49 USCA 1 (15)) provides for the suspension of that rule only when an emergency exists, not on a nation-wide basis but when it exists "*in any section* of the country"; that they permit the Commission to exercise its extraordinary or emergency powers by suspending Rule 34 for an indefinite period of time when the statute provides that the suspension can be only "for such time as may be determined by the Commission" (but that "time" must be determined when? At the time of issue and not later); that they permit the Commission to use the power granted it by Section 1 (15) of the Act so as not to conserve railway equipment, and in a way so as to penalize the shipping public by placing the carriers in a position whereby they can unjustly enrich themselves at the expense of the shipping public; and that they permit the Commission to use that power against the public when it is to be a restraint upon the carriers.

The jurisdiction of the three-judge District Court rests upon the provisions of the Acts of Congress approved June 25, 1948 (c. 646, 62 Stat. 869) Sections 2284 and 2325, Title 28, United States Code, Judiciary and Judicial Procedure.

The decision of the Interstate Commerce Commission here considered, is a decision of the kind that is to be heard and determined by a district court of three judges. Consequently, the decision of the court in this proceeding is the kind of a decision from which an appeal to the Supreme Court is allowed by Section 1253, Title 28, United States

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Code, "Judiciary and Judicial Procedure." The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by Section 1253, Title 28, United States Code, as that section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This is a suit that must be heard and determined by a district court of three judges, as Section 2325, Title 28, United States Code, provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission, shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Then Section 2101, Title 28, United States Code, provides, in part, as follows:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *
>
> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

The decision and order appealed from were rendered and entered on the 17th day of September 1949 and the petition for leave to take an appeal and assignment of errors were filed on the 15th day of November, 1949, and within sixty days from September 17, 1949 (28 USC 2101 (b)).

The District Court erred, we believe, as a matter of law, in refusing to grant the prayer of plaintiff for an order annulling, setting aside, and forever enjoining the enforcement, operation and execution of Service Order No. 68, issued January 30, 1942, and the report and orders rendered and entered on September 28, 1944, December 5, 1945, and April 5, 1948, in Docket 29072, A. B. Burton Company v. Pennsylvania Railroad, on the grounds that said orders, as plaintiff alleges, are unlawful, and contrary to the Interstate Commerce Act (49 USCA).

The decision of this Court in this proceeding should be reviewed by the Supreme Court of the United States and the decision reversed because the decision in this cause, on the meaning of the provisions of Section 1 (15) of the Interstate Commerce Act (49 USCA 1 (15)) is contrary to the decision, *on the same provisions,* by the District Court in United States v. Thompson, 58 F. Supp. 213; that the decision, contrary to law, permits the Commission to use the extraordinary and emergency powers granted it without requiring the Commission to comply with the limitations imposed upon its action and contained in that section (see 58 F. Supp. 213); that the decision, contrary to law, permits the Commission to issue, upon its own motion, an order, affecting car service, that has nation-wide application, that does not specify the duration of the emergency, that does not conserve railway equipment, that substitutes revenue for conservation of railway equipment; and that the decision permits the Commission to grant the carriers authority to make a charge for the carriers' failure to conserve rail-

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way equipment by permitting the carriers to furnish *for a charge* a larger size car than necessary to accommodate the shipment when Section 1 (15) of the Act (49 USCA 1 (15)) does not grant the Commission authority to authorize the carriers to impose a penalty or fine upon a shipper for using a larger size car than necessary to accommodate the shipment. A penalty or fine, when equipment is wasted, cannot conserve equipment or make the wasted equipment available for use, hence, there is no authority for an extra charge for the privilege of using the larger size car.

The decision appealed from is contrary to law, as the record shows that the carriers furnished larger size cars than those ordered, that no period of time indicating the duration of the emergency was shown and that there is no authority in Section 1 (15) of the Act (49 USCA 1 (15)) that will permit an extra charge to be made, as was done here, for using the car the carriers furnished in lieu of the size of car the shipper ordered.

The questions involved in this proceeding are all substantial. A review of this proceeding should be had and the Honorable Supreme Court should eliminate the conflict between the decision in this proceeding and the decision in United States v. Thompson, 58 F. Supp. 213, and should determine if the Commission can disregard the provisions of Section 1 (15) (49 USCA 1 (15)); can impose a fine or penalty upon a shipper when, as here, the carrier has been unjustly enriched due to the failure of the carrier to furnish the size of car ordered; and can railway equipment be actually conserved and made available for use to relieve an emergency simply by paying a premium to a carrier for the failure of a carrier to supply the proper size equipment.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

(Argued May 6, 1949. Decided Sept. 17, 1949)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges.

PAUL, District Judge:

This is a civil action brought by the plaintiff, Aubrey B. Burton, doing business as A. B. Burton Company, against the United States of America, seeking to have set aside and annulled certain reports and orders of the Interstate Commerce Commission, and to have this cause remanded to the Commission with direction to award reparation to plaintiff for certain freight charges alleged by him to have been illegally collected. A special court has been constituted, as required by 28 USCA 2284, to hear and determine this action. The facts are as follows:

On April 17, 18, 21, 1942, Herman M. Brown Company shipped four car-load shipments of tractor-drawn road scrapers from Highland Park, Iowa, to plaintiff at Keller, Virginia. The shipper had ordered of the carrier four 40-foot cars for these shipments, but the carrier in lieu thereof, furnished two 48-foot-6-inch cars, one 42-foot-1-inch car, and one 41-foot car. Each of the carload shipments could have been loaded on cars of the length ordered, i.e., 40-foot cars, and the weights of each shipment were less than the carload minimum provided for open cars 40 feet in length.

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Under these circumstances, prior to February 15, 1942, under the provisions of Interstate Commerce Commission Rule 34, the plaintiff would have incurred freight charges based on the minimum weight fixed for the 40-foot cars ordered.

However, on January 30, 1942, in order to prevent a shortage of railroad equipment, through misuse and wasteful use of cars by improper loading, the Interstate Commerce Commission issued Service Order No. 68 suspending the operation of Rule 34 during the war emergency insofar as it permitted freight cars to be used for carload freight otherwise than subject to the carload minimum weight provided for the car *actually used*. By reason of the suspension of Rule 34 by Service Order No. 68, the plaintiff was required to pay aggregate freight charges in the amount of $276.00 more than he would have been required to pay had Rule 34 been in force.

In a proceeding entitled "*Docket No. 29072, Aubrey B. Burton &c. v. The Pennsylvania Railroad Co., &c.*", the plaintiff alleged that the freight charges assessed against him were unjust and unreasonable and sought to have the Interstate Commerce Commission award him reparation by reason of the alleged freight overcharge. The Commission dismissed the complaint on September 28, 1944. Thereafter, upon petition of the plaintiff, the Commission reopened the proceedings for hearing, and after oral hearing and argument the Commission, by its report and order of December 5, 1945, dismissed the complaint. Subsequently, plaintiff filed a petition for reconsideration and rehearing, which was denied April 1, 1946. Later, in January 1948, plaintiff filed another petition for a reopening and reconsideration, which the Commission accepted and filed of record and then denied by its order of April 4, 1948. In this last petition, plaintiff for the first time alleged that Service Order No. 68 was invalid because no termination date was fixed in the order.

Thereafter, on December 18, 1948, plaintiff instituted this action, alleging the invalidity of Service Order No. 68 because no termination date was fixed therein, and praying that this Court annul and set aside the reports and orders

of the Commission mentioned above "and remand this cause to the Commission with direction to find for plaintiff in accordance with tariffs lawfully on file with the Commission." The real purpose of this action is to have this Court adjudicate that Service Order No. 68, which is no longer in force, was invalid when issued, and to direct the Interstate Commerce Commission to award plaintiff reparation in the sum of $276.00.

At the time this case was argued the defendants promptly advanced the contention that the court was without jurisdiction, basing their position on sections 8 and 9 of the Interstate Commerce Act (49 U.S.C.A. 8 and 9) and upon the interpretation given by the courts of these provisions of the statute, which, so far as pertinent, are as follows:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, * * *"
>
> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

We are inclined to agree with the position taken by defendants which was to the effect that the cited statute furnished the plaintiff the option of proceeding before the

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Commission for an award of reparations for the alleged overcharge or of instituting a suit in the district court to recover the overcharge; but that, having elected to pursue the former remedy, he could not, after failing therein, turn to the courts to recover damages. Until very recently an interpretation of the statute in accord with this viewpoint seems to have had the unanimous support of the various courts to which the question has been presented. See Ashland Coal & Ice Co. v. United States, 61 Fed. Supp. 708 (affirmed 325 U. S. 840) and the cases there cited, including Standard Oil Co. v. United States, 283 U. S. 235, 240-1; Hormel & Co. v. Chicago, etc., Ry. 283 Fed. 915, 918; Bartelsville Zinc Co. v. Mellon, 56 Fed. 2d. 154, 156; Brady v. Interstate Commerce Commission, 43 Fed. 2d. 847, 850-1; Atlantic Lumber Corp. v. Sou. Pacific Co., 47 Fed. Supp. 511, 513.

However, after the submission of the instant case and before its decision, the Supreme Court (on June 20, 1949) decided the case of United States v. I. C. C. et al., 337, U. S. 426, which we interpret as requiring that we assume jurisdiction and proceed to a determination of the case upon its merits. Counsel for all parties are agreed on submission of the case on the record and arguments already made.

Coming then to the merits, we find the issues to be within narrow limits. Section 1 (15) of the Interstate Commerce Act (49 U.S.C.A. 1 (15) provides that whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists, it shall have authority, upon complaint or upon its own initiative, with or without notice or hearing, to "suspend the operation of any or all rules, regulations or practices then established with respect to car service *for such time as may be determined by the commission.*" (Emphasis supplied.) Under this statutory authorization and because of the conditions affecting railroad transportation by reason of the war, the Commission, on January 30, 1942, issued its Service Order 68 which, among other things, suspended the operation of then existing Rule 34, with the provision "That this order (Service Order 68) shall become effective February 15, 1942, and *shall remain in force until further order of the Commission.*" (Emphasis supplied.)

Plaintiff bases his attack on Service Order 68 on the contention that it is invalid because by its terms it is made effective for an indefinite period, namely "until the further order of the Commission." Conversely stated it is contended that the order is invalid because it fixes no definite period of time for its operation. In other words we understand plaintiff to contend that the statutory grant of power to issue emergency orders "for such time as may be determined by the Commission," requires the Commission, contemporaneously with its exercise of the powers, to determine the time during which the order shall be effective and to incorporate therein a date for its termination. The plaintiff does not deny, so we understand, that if the order contained a fixed date of termination, the Commission would have the right to renew or extend it from time to time for further fixed periods of time, so long as the emergency existed.

To uphold his contention the plaintiff relies on the case of U. S. v. Thompson (D. C., Mo.), 58 Fed. Supp. 213, 216-7, which supports the position taken by him. He cites no other authority. Without attempting to set forth or analyze the reasoning of the court in the cited case, it need only be said that we are unable to agree in the conclusion reached there.

The statute (49 U.S.C.A. 1 (15)) gives the Commission broad powers in this connection. In finding the existence of an emergency it is guided only by its own opinion; and when it has found an emergency to exist it is authorized to suspend existing rules, regulations and practices upon its own initiative, with or without notice or hearing, as its judgment dictates. In view of the practically unrestricted powers which Congress has granted the Commission we see no justification for this court to impose upon it a restriction which is neither expressed or implied by the language of the statute and for which no sound reason is advanced.

It is not ordinarily to be expected that when an emergency arises requiring the action of the Commission the period of its duration can be accurately predicted; and this is certainly true when the conditions of emergency are created by a world-wide war. And we see nothing in the

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language "for such time as may be determined by the commission" that requires that body to attempt to determine beforehand how long the emergency will last rather than to determine when the emergency shall have ceased. What the plaintiff is asking is that the court add to the phrase "such time as may be determined by the commission" the additional words "at the time of issuing the suspension order." But that is not the language of the statute and we see no reason in the language as written, or in the purpose to be accomplished, for implying that the statute intended to impose any such condition.

About the only argument offered by plaintiff is that unless a time limitation is contained in the suspension order when it is issued, the Commission is not required to re-examine the situation to determine whether the emergency continues in existence at any particular time. The implication seems to be that the Commission, having entered a suspension order, might forget that it had done so and, unless subject to periodical reminders, might overlook lifting the suspension when the reason for it no longer existed. We are not impressed by this argument. It is to be remembered that the rules which are authorized to be suspended (in this case Rule 34) are those established by the Commission itself because they are deemed desirable or necessary in the public interest under normal conditions. When, due to emergency conditions, it becomes necessary to suspend them it may be presumed that the Commission will be alert to restore them as soon as it becomes proper to do so. It is hardly to be expected that the members of the Commission would need to be reminded from time to time whether or not the war was still going on.

We have no doubt that the Commission has power to fix a definite period for the operation of a suspension order on those occasions where the duration of the emergency can be foreseen, as for example, where it is created by seasonal conditions, and we dare say that the Commission has on appropriate occasions pursued this course. But we see nothing in the statute that requires it to do so. And we think that where the emergency is one the duration of which is completely unpredictable, as in case of a great war, the Com-

mission has an equal power to make its suspension order run until such time as it may in the future determine that it may properly be ended.

Aside from the above no reason is offered in support of plaintiff's contention. No argument is presented that any carrier or shipper is placed at a disadvantage or is in any way adversely affected by the fact that the suspension order fixes no definite period of duration. No reason is advanced suggesting that the interpretation of the statute which plaintiff urges is logical or necessary for an effective or convenient operation of the suspending order. And no such reason occurs to us. There seems no difference in the practical effect or results between a situation where the Commission issues one order effective until such time as it may determine that the emergency has ceased and that where an order is entered limited to a definite date but is followed by other similar orders, each taking up where the preceding left off and successively extending the effective date until the emergency is ended. In either event the result is the same and is within the clear scope of the Commission's powers, which are to suspend existing rules and practices during an emergency and to determine when that emergency has ended.

We think that the attack upon the validity of Service Order 68 is without merit, and that the complaint should be dismissed.

____ ____,
U. S. Circuit Judge.

____ ____,
U. S. District Judge.

____ ____,
U. S. District Judge.

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APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

(Argued May 6, 1949. Decided September 17, 1949.)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges.

BARKSDALE, District Judge, dissenting:

I am in entire accord with the majority as to the conclusion reached on the jurisdictional question. However, I differ from my brethren in the conclusion I reach on the merits.

The emergency powers of the Commission under the statute above quoted (49 USCA 1 (15)) have been considered in a number of cases. *United States* v. *Koenig &c.*, 270 U. S. 512, *Peoria &c. Ry. Co.* v. *United States &c.*, 263 U. S. 528, *Avent* v. *United States*, 266 U. S. 127, 15 F. (2d) 616, *United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521. However, the precise question here involved seems to have been considered in only one reported case, which was the decision of a one judge District Court in Missouri. *United States* v. *Thompson*, 58 F. Supp. 213. In that case, the court was considering subparagraph (d) of Section 1, paragraph (15) of the Act, wherein the pertinent language is "for such periods as it may determine," but it would not seem that there is any substantial difference between that phrase and the one here under consideration, ("for such time as may be determined.") The court there

held that the quoted language required the Commission, on the issuance of its emergency order, to determine and state therein the period during which the order shall be in effect. No case is cited as authority for this conclusion, and so far as I have been able to ascertain, there is none. Nor do I find any decision to the contrary.

There can be no doubt that the statute gives the Commission broad and drastic emergency powers. The Commission is given power to suspend the operation of any or all rules, regulations or practices with respect to car service, to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers, as in its opinion will best promote the service, to require joint or common use of terminals including main line track or tracks for a reasonable distance outside of such terminals as in its opinion will best meet the emergency, and to give directions for preference or priority in transportation, embargoes or movement of traffic under permits. These drastic powers may be exercised by the Commission "either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answers or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine;". Almost the only limitation on the exercise of these powers is the limitation of time above referred to. Defendants admit that such orders must be limited to the period of the emergency, but contend that the Commission may determine the time during which such orders shall be effective, at any time after they have been issued. However, the fundamental difference between the practice of incorporating a time limitation in an emergency order, and the practice of determining the expiration date at some indefinite time after the order has been issued, is that unless some time limitation is incorporated in the order when issued, the Commission is not required to re-examine the situation and determine whether or not the emergency continues to exist, at any particular time. Mere inaction on the part of the Commission will result in the continued effectiveness of the emergency order. It would seem highly

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desirable that the Commission be vested with broad and drastic discretionary powers, and I find no expression to the contrary in any of the decided cases. However, it does seem that the exercise of such powers should be strictly within the limitations of the statute. No one questions the power of the Commission to extend the period of effectiveness of an emergency order beyond the termination date originally incorporated in the order, by a finding of a continuation of the emergency and a proper order of extension.

Emergency orders entered under the authority of this statute, while in the public interest, might result in great hardships to individual shippers and carriers. In emergencies, such hardships must be endured in the public interest. But I cannot see how the effectiveness of the Commission's emergency powers would be adversely affected by requiring it from time to time to re-examine the situation and determine whether or not the emergency continues and requires the continued operation of the emergency order.

I do not find any case wherein the conclusion reached in *United States* v. *Thompson, supra,* has been considered by any other court. However, in the only case I find which considers the above statute since the decision in *United States* v. *Thompson, supra, Iversen* v. *United States &c.,* 63 F. Supp. 1001, a three-judge district court in the District of Columbia had for consideration four emergency Service Orders. Each of these orders *expired, by its own terms, on a specific date.* Although the question here under consideration was not before the court, Judge Prettyman, speaking for the court, said (p. 1005):

> "It follows that when an emergency exists, the Commission can, without hearing, issue, *effective for a limited time,* orders in respect to these (demurrage) charges." (Italics supplied.)

I am therefore of the opinion that Service Order No. 68 was invalid, because it was effective for an indefinite time, and not for a time determined by the Commission, as required by the statute.

A. D. Barksdale,
United States District Judge.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, CONTINUED AND HELD AT LYNCHBURG ON THE 17TH DAY OF SEPTEMBER, 1949

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

This matter having been heard upon the record prepared and upon the oral arguments on behalf of all parties and upon written briefs filed.

And the court having duly considered the same and being of opinion that the complaint is without merit, the reasons for which conclusion being stated in a written opinion this day filed as a part of the record.

It is accordingly ordered that the said complaint be, and it is hereby, dismissed at the cost of the plaintiff.

It is further ordered that the clerk of this court certify and mail copies hereof to the following:

Wilbert G. Burnette, Attorney at Law, Peoples Nat'l Bank Bldg., Lynchburg, Va.

Edward C. Dumbauld, Special Assistant to the Attorney General, Washington, D. C.

H. L. Underwood, Attorney, Interstate Commerce Commission, Washington, D. C.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

JOHN PAUL,
U. S. District Judge.

A. D. BARKSDALE,
U. S. District Judge.

A copy, Teste:
OTWAY PETTICREW,
Deputy Clerk. (Seal.)

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